IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 745.

THE SCHENECTADY UNION PUBLISHING COMPANY, *Petitioner*,

v.

MARTIN L. SWEENEY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

OPPOSITION TO MOTION FOR EXTENSION OF TERM AND FOR EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION OF DECISION.

The respondent, Martin L. Sweeney, by his counsel, John O'Connor, opposes the motion filed herein and for cause of his opposition says:

This Court affirmed the judgment of the Second Circuit Court of Appeals on April 13, 1942, and on May 11, 1942, denied a petition for rehearing filed by the petitioner. On

May 18, 1942, the mandate of this Court was issued to the District Court of the United States for the Northern District of New York, and the case will in due course be assigned for trial on the merits.

While this latest move by counsel for the petitioner might be credited to unparalleled persistency, rather than to harassment of the respondent, we most earnestly submit that the motion should not be seriously considered in the light of any of the reasons advanced by the petitioner.

On page 2 of its motion, petitioner says:

> "The next few months, however, will witness important developments in other Sweeney litigations which may have a crucial bearing hereon, as well as the final outcome of the *Hall* case, which may produce a New York Court of Appeals pronouncement on the rules of libel properly referable to public officials in New York."

The foregoing statement by the petitioner is, in its pertinency to the case herein, without any foundation in fact whatsoever.

Firstly, no appeal in the *Hall* case has been taken to the New York Court of Appeals, up to this writing.

Secondly, the *Hall* case involved facts which were admitted to be true, and hence the decision turned solely on a question of *fair comment and criticism,* having no relevancy, whatsoever, to the instant case. One of our authorities for the foregoing is none other than the solicitor for the petitioner, who in a letter, dated April 2, 1942, addressed to the Honorable Chief Justice of this Court, had this to say in reference to the *Hall* case.

> "*Hall* v. *Binghamton Press Co.,* decided by the Appellate Division, Third Department, on March 4, 1942, is simply an illustration of 'fair comment on facts truly stated,' which has nothing to do with the present case."

We agree.

In *Sweeney* v. *Philadelphia Record Company, et al.* (pet. motion p. 2, note 2), the Circuit Court of Appeals for the Third Circuit predicated its decision principally on a pro-

vision of the Pennsylvania Constitution, and distinguished the decision in the *Schenectady Union Publishing Company* case, as founded on the law of New York State—all of which was before this Court on the oral argument herein. The possibility, or probability, of an application for a writ of certiorari being made to this Court in the *Philadelphia Record* case, obviously would present no shadow of reason for granting petitioner's motion, even if it were not the fact that on May 21, 1942, Representative Sweeney advised counsel that because of the shortness of time a petition for certiorari to this Court in the *Philadelphia Record* case will not be filed. Other cases still pending in the State of Pennsylvania may furnish opportunities for a review of the Pennsylvania law of libel as stated by the Third Circuit Court of Appeals.

As to *Sweeney* v. *United Feature Syndicate, Inc.* (pet. motion p. 2, note 2), pending in the Circuit Court of Appeals for the Second Circuit, while that case involves again the New York law of libel, the question there is whether or not the trial court properly instructed the jury.

In reference to "the nine Kansas cases" (pet. motion p. 2, note 2), the petitioner must surely know that the appeals therein are from Orders of the District Court, dismissing the cases for lack of prosecution, and the only result of a reversal of such Orders would be to restore the cases to the trial calendar.

The cases cited by petitioner at page 2, note 4, concerned rearguments, where petitions for rehearing filed in due course *within the term*, had been *granted*. The petition for rehearing in the instant case has been *denied*. Further, none of the cases relied on involved actions founded in tort, and all presented entirely dissimilar situations than that of the case at bar.*

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* *Home Insurance Company* v. *New York*, 134 U. S. 594, was to recover a tax imposed by legislative act of the State; *The Selma Rome & Dalton R. R. Co.* v. *United States*, 139 U. S. 560, was predicated upon an alleged breach of contract; *United States* v. *Sischo*, 262 U. S. 165, involved an action for the recovery of a penalty for bringing of merchandise illegally into the country.

Petitioner's reference (p. 2) to "The national significance of the instant case" must be considered to be in the same category as other expressions found in previous briefs filed herein by the petitioner, such as the "group libel rule," the "state of mind rule," the "public official rule," all originations, although often embraced within quotation marks.

It is respectfully—if somewhat impatiently—submitted that an end should be put to these proceedings, as the motion herein is obviously based upon nonexistent grounds, and, if granted, further proceedings would necessarily be staggered over a period of many months, all operating so as to unduly delay a final determination of the cause on the merits, with the consequent result of working an undue hardship on this respondent. It is therefore respectfully urged that the motion be denied.

Respectfully submitted,

JOHN O'CONNOR,
Counsel for Respondent.

Of Counsel:
WILLIAM F. CUSICK,
WILLIAM F. CONWAY.